No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
First Appellate District

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioners remains accurate.

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents propose an interpretation of the "except" clause that would render it inoperative. They suggest that their reading would clarify that section 16(b) of the Securities Act of 1933 (1933 Act) withdraws jurisdiction over "mixed cases." But that argument crumbles on even minimal scrutiny. Section 16(b) places no limit on jurisdiction, imposes no restriction on federal claims, and leaves no pertinent ambiguity to clear up.

Ultimately, then, respondents must admit where their reading leads: It would render "the jurisdictional amendment * * * a road to nowhere," robbing Congress's enactment of all meaning. Resp. Br. 24.

Not incidentally, it would enable respondents and every other plaintiff class to sidestep the carefully crafted restrictions of the Private Securities Litigation Reform Act (Reform Act)—including its limits on strike suits, professional plaintiffs, and abusive attorney's fees—through the simple expedient of filing federal securities class actions in state court.

This is no way to read a statute. Congress made clear which claims it sought to "except" from the concurrent jurisdiction of state courts: 1933 Act claims in "covered class actions," "as provided in [section 16]." 15 U.S.C. § 77v(a). That reading gives force to the words Congress enacted. It avoids opening a gaping hole at the center of Congress's regulatory scheme. And it achieves the express aims of the Securities Litigation Uniform Standards Act of 1998 (SLUSA): vindicating the objectives of the Reform Act, stemming the "shift[] from Federal to State courts," and ensuring that all securities class actions of federal concern are governed by "Uniform Standards." Pub. L. No. 105-353, § 2(1)-(2), (5).

The judgment should be reversed.

ARGUMENT

I. PETITIONERS' READING IS THE ONLY ONE COMPATIBLE WITH SLUSA'S TEXT, STRUCTURE, AND PURPOSES

A. Petitioners' Reading Follows From And Gives Effect To The Clause's Text

Section 22(a) of the 1933 Act provides that state courts have "concurrent" "jurisdiction * * * of all suits * * * brought to enforce [the 1933 Act]," "except as provided in [section 16] with respect to covered class actions." 15 U.S.C. § 77v(a). By its plain terms, this clause must "except" some set of 1933 Act claims

from the concurrent jurisdiction of state courts. And the clause's text makes clear which claims those are: 1933 Act claims in "covered class actions," "as provided in [section 16]." This reading accords with the way similar phrases are used elsewhere in the U.S. Code and makes sense of the clause's text. Equally important, it is the only construction that gives the "except" clause any effect, rather than reducing it to "a road to nowhere." Resp. Br. 24.

1. Petitioners' interpretation is the best reading of the clause's text

Start, as the Court always does, with the words of the statute. The "except" clause consists of two halves: (1) "except as provided in [section 16]" and (2) "with respect to covered class actions." The first half points the reader to section 16: It informs her that the jurisdiction of state courts is limited "in accordance with what" is specified (or "stipulate[d]") in that section. Oxford English Dictionary (3d ed., rev. 2017) (defining "as" to mean "in accordance with what (is)"); *id.* (defining "provide" to mean "[t]o stipulate in a will, statute, etc."). The second half then tells the reader where in section 16 to look: the term "covered class actions." Putting the halves together, the clause thus withdraws jurisdiction as to "covered class actions" specified in section 16.

Respondents and the United States argue that the text cannot bear this reading because the words "as provided in" must incorporate "a self-operative limit" from another statute. Resp. Br. 14; *see* U.S. Br. 12-13. It is true enough that Congress *sometimes* uses the words "as provided in" in that sense. But that is not the *only* way Congress uses the phrase. Some statutes use "as provided in" more generally to

borrow a term or concept from another provision, which requires some translation to be incorporated into the relevant statute. *See Torres* v. *Lynch*, 136 S. Ct. 1619, 1625-26 (2016) (explaining that the phrase "described in" sometimes "convey[s] exactness," and other times "has a looser meaning" that "entails * * * not precise replication, but convey[ance of] an idea or impression" (internal quotation marks omitted)).

To take just one representative example, 33 U.S.C. § 3801(9) provides that "[t]he term 'person' means * * * any department, agency, or instrumentality of the United States, except as provided in section 3802(b)(2)." Under respondents' reading, one would expect the cross-referenced section to provide a "self-operative limit" on the meaning of the term "person." Instead, however, it states that "[t]he Administrator [of the Environmental Protection Agency] may apply any requirement of this chapter to one or more classes of vessels," subject to the concurrence of the relevant agency. 33 U.S.C. § 3802(b)(2)(A). With a bit of work, one can understand what Congress meant through the cross-reference: that certain vessels are not "persons" unless the Administrator affirmatively designates them as such. But the cross-referenced provision assuredly does not "supply" that limit of its own force.[1]

[1] For other examples, *compare, e.g.*, 37 U.S.C. § 101(22) ("[t]he term 'inactive-duty training' * * * does not include work or study in connection with a correspondence course" "except as provided in section 206(d)(2)"), *with id.* § 206(d)(2) (National Guard reserves "may be paid compensation under this section" upon "successful completion of a course of instruction"); *and* 42 U.S.C. § 254*l*(g) ("A scholarship * * * shall consist of * * * the

An ordinary reader of English can easily understand the phrase "as provided in" used in this way. Consider a parking sign that says, "No parking, except as provided in 5 U.S.C. § 6103 with respect to legal public holidays." Section 6103(a) contains a list of "legal public holidays"; it says nothing about parking. But a reader would have little difficulty grasping what the sign means: that a person cannot park except on legal public holidays, as defined in 5 U.S.C. § 6103(a).

Several contextual considerations indicate that Congress used the phrase "as provided in" similarly in the "except" clause. *First*, Congress conjoined the words "as provided in [section 16]" with the phrase "with respect to covered class actions"—thereby pointing the reader to a procedural vehicle ("covered class actions") rather than a particular operative subsection. Respondents and the United States cannot explain why the words "with respect to covered class actions" appear in the statute at all. Their textual analyses hardly mention these six words, and do not even purport to give them effect. *See* Resp. Br. 11-14; U.S. Br. 20-21.[2]

Second, it is significant that Congress chose to cross-reference section 16 as a whole, rather than a particular subsection. Had Congress wished to

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amount (except as provided in section 292k of this title) of" tuition and educational expenses), *with id.* § 292k ("Federal credit unions shall * * * have power to make insured loans to eligible students").

[2] Respondents cite several statutes containing the words "with respect to [X]," but they only prove the point; in each instance, that phrase works to narrow or clarify the statutory cross-reference. *See* Resp. Br. 13-14 n.5.

incorporate the preclusion rule contained in section 16(b), it could easily have cited that subsection directly, much as it did elsewhere in SLUSA. *See* U.S. Br. 13 (listing provisions). That Congress cited section 16 more broadly suggests that its focus was not on a particular subsection but on the term—"covered class actions"—to which the "except" clause expressly refers.

Third, a comparison with the anti-removal provision makes clear that these textual choices were deliberate. As respondents and the United States note, Congress enacted the "except" clause side-by-side with an exception to the anti-removal provision, and used comparable phrasing in both provisions. *See* SLUSA § 101(a)(3)(A)-(B). There is accordingly a strong presumption that each difference in their language was purposeful. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). It is telling, then, that the anti-removal provision omits the words "with respect to covered class actions" and cross-references section 16(c) directly. *See* 15 U.S.C. § 77v(a) ("Except as provided in [section 16(c)]"). Petitioners can account for why Congress drafted the provisions differently; respondents and the United States cannot.

Respondents' attempts to reconcile their reading with these textual choices are unpersuasive. Respondents claim (at 14) that the "except" clause cites section 16 as a whole because Congress wished to incorporate the "exclusions" and "definitions" applicable to section 16(b). But those exclusions and definitions apply to section 16(b) expressly. *See* 15 U.S.C. § 77p(d)(1)(A), (d)(3), (f). Moreover, section 16(c) is subject to all the same exceptions and definitions, yet Congress deemed it appropriate to cross-

reference section 16(c) directly in the anti-removal provision. *See id.* § 77v(a).

Respondents also observe that when the words "as provided in" appear elsewhere in SLUSA, they typically cross-reference a "substantive limit[]." Resp. Br. 16-17; *see* U.S. Br. 13. But none of those provisions includes the phrase "with respect to" or cites a statutory section as a whole. Nor would reading them as respondents propose render the provisions superfluous, overthrow SLUSA's design, or thwart the Act's express purposes. *See infra* pp. 7-20. That is more than enough context to demonstrate that Congress used the words differently in the "except" clause. *See Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014 T]he presumption of consistent usage 'readily yields' to context.").

Finally, respondents quibble (at 15) that Congress could have expressed itself more clearly by rearranging the clause's words and replacing "provided" with "defined." The formulation Congress used, however, is an established and comprehensible way of cross-referencing a term from another statute. Furthermore, Congress inserted this phrase into a highly complex provision, which even the most skillful drafter would have had difficulty amending clearly. That the final product falls somewhere short of a "*chef d'oeuvre* of legislative draftsmanship" is no reason to declare it inoperative. *Id.*

2. Respondents' and the United States' reading would render the clause a nullity

Petitioners' reading is reinforced by the fact that it is the only one that gives the "except" clause "real and substantial effect." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014). Under the

readings respondents and the United States propose, the clause would "except" nothing from the jurisdiction of state courts—reducing the clause to a nullity, and for all practical purposes excising it from the U.S. Code.

a. As noted, respondents maintain that the "except" clause must be read to cross-reference a "self-operative limit" on state-court jurisdiction over 1933 Act claims. Resp. Br. 14. But as the United States correctly observes, section 16 "contains no such limitation." U.S. Br. 11. The section's operative provision, section 16(b), *precludes* a class of claims; it does not limit jurisdiction. Further, section 16(b) does not address federal claims at all: It applies only to actions "based upon the statutory or common law of [a] State," and thus imposes no restriction on claims "brought to enforce" the 1933 Act. Finally, section 16(b) limits the authority of both state *and* federal courts, thus making it a wholly inapposite source for a limit on "State * * * court[s]" alone. If the only function of the "except" clause is to incorporate some "self-operative limit" contained in section 16, then it does exactly nothing.

At the certiorari stage, respondents were content to leave it at that. *See* Br. in Opp. 1. Apparently realizing that position was untenable, respondents have since tried to identify *some* set of claims that the "except" clause exempts from state-court jurisdiction. Their late-breaking position is that the clause serves to "strip[] state courts of jurisdiction over mixed cases"—that is, covered class actions that raise both 1933 Act and state-law claims. Resp. Br. 5.

That is impossible. First, section 16(b) does not concern the federal half of mixed cases at all. It only prohibits courts from entertaining "action[s] based upon the statutory or common law of a[] State." 15 U.S.C. § 77p(b). Accordingly, if plaintiffs bring a mix of state and federal claims, section 16(b) instructs courts to dismiss the state claims as precluded while leaving the federal claims undisturbed. *See, e.g., In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 153 (2d Cir. 2015); *see also Jones* v. *Bock*, 549 U.S. 199, 221 (2007) (where a statute forbids a particular type of "action," and "a complaint contains both good and bad claims," the court "proceeds with the good and leaves the bad"). Section 16(b) thus imposes no restriction on 1933 Act claims even when brought as part of mixed actions—and so furnishes no limit on those claims for the "except" clause to incorporate.

Second, the problem remains that section 16(b) governs preclusion, whereas the "except" clause divests state courts of jurisdiction. *See Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 636 n.1 (2006). No matter how far section 16(b) extends, it cannot supply the self-operative limit on jurisdiction that respondents' reading demands.

Recognizing this problem, respondents abruptly drop their insistence on a "self-operative limit" midway through their brief, saying that this "does not accurately capture how laws are actually written." Resp. Br. 23. Instead, they say, the "except" clause merely needs to cross-reference a provision that will help "define the scope" of the jurisdictional provision. *Id.* at 22. That is a welcome concession, but it also forfeits the textual premise on which respondents' entire argument rests. For if the "except" clause simply functions to "define the scope" of

state courts' jurisdiction, then the Court need not look far to determine how Congress wished it defined: as extending to 1933 Act claims except in "covered class actions."

As a back-up argument, respondents propose (at 24) that the "except" clause can be read to "incorporate" section 16(c). That proposal makes no sense. Section 16(c) does not create an "except[ion]" to concurrent jurisdiction. It merely gives defendants the *option* to remove to federal court. 15 U.S.C. § 77p(c). It accordingly cannot furnish the "limit" on state-court jurisdiction that respondents' reading requires.

b. The United States, to its credit, recognizes that the textual reading it proposes would deprive the "except" clause of any real effect. U.S. Br. 20. But it argues that Congress might still have enacted the clause to clear up a sliver of ambiguity. "Congress," the United States speculates, "may have been concerned" that plaintiffs would try to argue that section 22(a) "provides state courts with jurisdiction over mixed class actions in their entirety." *Id.* It suggests that Congress enacted the "except" clause to "reinforce[] * * * that state courts may not entertain any state-law claims," even as part of mixed actions. *Id.*

This argument rests on a fatally flawed premise. Contrary to the United States' apparent belief, state courts *do* have jurisdiction over state-law claims barred by section 16(b). *Kircher* expressly said so: It explained that "nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions," and that state courts are an "equally competent body" to determine whether state-law claims should be dismissed as nonactionable under section

16(b). 547 U.S. at 646. Accordingly, if plaintiffs were to argue that SLUSA does not divest state courts of jurisdiction over state-law claims in a mixed action, they would be *correct*. Congress surely did not enact the "except" clause to "reinforce[]" a mistaken view to the contrary.

The United States suggests (at 21) that Congress may have been worried that courts would hold that section 22(a) overrode the *substantive* "limitations imposed by [section 16(b)]." That worry is wholly implausible. Section 22(a) grants jurisdiction over federal-law claims. Section 16(b) precludes state-law claims. There is no "conflict," U.S. Br. 22, or even arguable inconsistency, between these two provisions. Although Congress sometimes enacts text to dispel a negative implication, illustrate the meaning of a broad term, or remove other plausible "doubt[s]" about a statute's meaning, *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 383-384 (2013), there is no authority for the proposition that it enacts language to foreclose frivolous arguments any court would swiftly reject.

c. With all else having failed, respondents throw up their hands and ask the Court to "hold that the jurisdictional amendment is essentially a road to nowhere." Resp. Br. 24. The United States arrives at essentially the same place, suggesting that Congress may have enacted the clause to "address[] a non-existent risk." U.S. Br. 23. Those solutions are unacceptable. Congress took care to amend section 22(a) by adding the "except" clause. That amendment should be read as having "real and substantial effect," not reduced to a worthless gewgaw.

B. Petitioners' Reading Comports With SLUSA's Structure

1. The statutory structure confirms that petitioners' reading is the correct one. The different provisions of SLUSA and the Reform Act work together "as a symmetrical and coherent regulatory scheme" to prevent plaintiffs from maintaining securities class actions of federal concern in state court, free of the Reform Act's restrictions. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995). Thus, section 16(b) precludes *state-law* covered class actions involving nationally traded securities. And sections 16(c) and 22(a) authorize removal of *mixed* covered class actions involving both state-law and 1933 Act claims.

It would be exceedingly anomalous if SLUSA did not similarly enable defendants to move exclusively *federal* covered class actions out of state court. Those are the securities class actions of greatest federal concern. And the Reform Act carefully regulates these suits through a suite of restrictions that apply exclusively in federal court. *See* 15 U.S.C. § 77z-1(a). Construing the "except" clause to divest state courts of jurisdiction over 1933 Act covered class actions would ensure that plaintiffs cannot evade the Reform Act, and sidestep SLUSA's other limits, through the expedient of filing a federal class action in state court.

The United States largely agrees with this structural analysis, which it says "reflects an accurate assessment of congressional purpose." U.S. Br. 15. As it explains, "Congress would not have been content to leave 1933 Act claims 'stuck in state court,' where they would not be subject to the [Reform Act]'s substantive and procedural requirements." *Id.*

(quoting Pet. Br. 18). Although the United States believes there is another route to reaching that result, it concurs on this critical point: SLUSA cannot reasonably be construed to deprive defendants of a federal forum for 1933 Act covered class actions. *See id.* at 26.

2. Respondents nevertheless propose an interpretation of the statute that would do just that. They fail to offer any plausible structural defense of this reading.

Respondents claim that their interpretation "harmonize[s]" the various provisions of SLUSA by causing each one to have an "identical * * * scope." Resp. Br. 17, 20. But it is evident from the plain text of the statute that Congress intended sections 16(b) and 22(a) to cover *different* sets of claims. Section 16(b) precludes claims "based upon * * * *[s]tate*" law, 15 U.S.C. § 77p(b) (emphasis added), whereas section 22(a) withdraws jurisdiction over actions "brought to enforce * * * *this subchapter*" and authorizes removal of "case[s] arising under *this subchapter*," *id.* § 77v(a) (emphases added). Furthermore, Congress enacted SLUSA to prevent "evasion of the [Reform Act]." Resp. Br. 3. Construing the statute to deal with a single, narrow form of evasion—while leaving wide open an alternative way of avoiding the Act's limits—is hardly faithful to that end.

Respondents also argue (at 19) that "[t]he point" of SLUSA's provisions "is to require plaintiffs to plead their claims under federal law," and nothing more. That cannot be right. Respondents themselves acknowledge that SLUSA authorizes removal of mixed cases in their entirety. And the Reform Act's restrictions on 1933 Act class actions apply exclu-

sively in federal court. 15 U.S.C. § 77z-1(a). It is implausible that Congress was indifferent to whether federal class actions were exempt from, rather than subject to, these detailed requirements.

3. Lacking any plausible way of reconciling their reading with the statutory structure, respondents devote most of their energy to attacking perceived flaws in petitioners' interpretation. Even if these critiques had merit, they pale in comparison to the gaping hole respondents' reading would carve into the statute. But none of their criticisms withstands scrutiny.

a. Respondents argue (at 19) that it would have been "bizarre" for Congress to prescribe "different kinds of treatment" for state-law class actions, mixed class actions, and 1933 Act class actions. But the differences in treatment all flow from a single aim: to require plaintiffs to file securities class actions in federal court, subject to the protections of the Reform Act. Thus, Congress precluded state-law class actions, which are exempt from the Reform Act entirely. 15 U.S.C. § 77p(b). It required plaintiffs to file 1933 Act class actions directly in federal court, where the Reform Act's provisions apply. *Id.* § 77v(a). And for mixed class actions, it split the baby, authorizing defendants to remove the suits to federal court, where the state-law claims would be dismissed and the 1933 Act claims could proceed subject to the Reform Act. *Id.* §§ 77p(c), 77v(a). This scheme achieves Congress's goals just about as efficiently as possible; there is nothing "bizarre" about it.

b. Respondents, echoed by the United States, also argue that it would be anomalous for SLUSA to exclude *all* 1933 Act covered class actions from state-

court jurisdiction, given that section 16(b) precludes only those state-law covered class actions that (1) involve nationally traded securities and (2) allege "an untrue statement or omission of a material fact" or the use of a "manipulative or deceptive device." Resp. Br. 18; *see* U.S. Br. 17 (quoting 15 U.S.C. § 77p(b)). But Congress imposed both requirements for reasons unique to state-law claims that have no application to 1933 Act class actions.

First, as this Court has explained, Congress limited its preclusion of state-law class actions to nationally traded securities because it wished to avoid intruding on "state legal authority * * * over matters that are primarily of state concern." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1068 (2014). Because of the 1933 Act's broad definition of "security," precluding all state-law securities class actions would have significantly "interfere[d] with state efforts to provide remedies for victims of ordinary state-law frauds." *Id.* Those federalism concerns carry little if any weight when limiting the *forum* in which plaintiffs may bring *federal* securities class actions.

Second, the requirement that precluded state-law claims involve untrue statements or deceptive devices "expressly replicates" an element of sections 11 and 12 of the 1933 Act. *Kingate*, 784 F.3d at 139; *see* 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Congress thus had no need to reiterate that requirement when referring to 1933 Act claims directly. There is one narrow type of 1933 Act claim that arguably need not entail untrue statements or deceptive devices: a claim under section 5 of the Act alleging the sale of unregistered securities in interstate commerce. 15 U.S.C. §§ 77e, 77*l*(a)(1); *but see Troice*, 134 S. Ct. at 1067 (noting that these claims also entail "deceiv[ing] a person").

But section 16(b) does not preclude claims involving unregistered securities for the straightforward reason that section 16(b) is limited to securities traded on national exchanges, which by definition are either registered or exempt from registration requirements. *See* 15 U.S.C. §§ 77p(f)(3), 77r(b). Congress's omission of such claims from section 16(b) thus says nothing about whether it wished them included in section 22(a).

The Reform Act supports these conclusions. When Congress imposed limits on 1933 Act class actions in that statute, it did not confine them to suits involving nationally traded securities and untrue statements or deceptive devices. It stands to reason that the "except" clause, which seeks to prevent evasion of the Reform Act's standards, does not include such limits, either.

The United States objects (at 19) that "the [Reform Act's] protections apply to all plaintiff class actions arising under the 1933 Act," whereas "the 'except' clause is limited to 'covered class actions.'" But Congress had no choice but to draft the statutes slightly differently. The Reform Act's class-action protections apply only in federal court, and so extend to any 1933 Act suit "brought as a plaintiff class action *pursuant to the Federal Rules of Civil Procedure*." 15 U.S.C. § 77z-1(a) (emphasis added). The "except" clause, in contrast, withdraws jurisdiction from state courts, where the Federal Rules do not apply. Congress accordingly needed to find a different way of capturing the same class of suits. It did so by adopting the term "covered class action," which closely tracks the federal definition, but also contains rules that make it predictable for state courts to

apply and difficult for plaintiffs to skirt. S. Rep. No. 105-182, at 6-7 (1998).

C. Petitioners' Reading Accords With SLUSA's Purposes

SLUSA's history and purposes provide further reason to read the statute as petitioners propose.

1. The Act's express findings make clear that Congress had three interrelated goals in enacting SLUSA: first, to assist the Reform Act in "fully achieving its objectives," SLUSA § 2(1); second, to halt the "shift[] from Federal to State courts" of "securities class action lawsuits," *id.* § 2(2)-(3); and, third, to "enact national standards for securities class action lawsuits involving nationally traded securities," *id.* § 2(5). Petitioners' reading would advance these aims, whereas respondents' would thwart them all.

a. *"[F]ully achieving [the Reform Act's] objectives."* Respondents do not dispute that the Reform Act sought to curb abuses in federal securities litigation by imposing stringent restrictions on 1933 Act class actions filed in federal court. *See* 15 U.S.C. § 77z-1(a). And they do not deny that their reading would permit "plaintiffs' lawyers * * * to circumvent the Act's provisions, by * * * filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998).

Respondents' only defense (at 27-28) is that this sort of evasion "cannot be circumvention" of the Reform Act, because the Reform Act *itself* did not bar plaintiffs from bringing 1933 Act suits in state court. That is absurd. The entire premise of SLUSA is that

the Reform Act did not go far enough, and that additional protections were required to "fully achiev[e] its objectives." Inferring that Congress intended only those restrictions in the Reform Act and nothing more would deny SLUSA its central purpose.

b. *Halting the "shift[] from Federal to State courts."* Respondents' reading would also fail to stem the shift of securities class actions from federal to state courts. Under their interpretation, plaintiffs would remain free to file federal securities class action suits in state court. And as the dramatic increase in class-action filings in California illustrates, plaintiffs would have every incentive to do so, given that proceeding in a state forum would free them of the Reform Act's strictures. *See* Amicus Br. of N.Y. Stock Exch. 9; Amicus Br. of Law Professors 19-20.

Respondents claim that when Congress lamented the shift from federal to state court, its concern was really with suits filed *under state law*. But that is not what the Act's findings say. Nor does it make sense. Prior to SLUSA, plaintiffs could evade the Reform Act's restrictions by filing state-law suits in "State *or* Federal court." 15 U.S.C. § 77p(b) (emphasis added). Congress's focus on the forum indicates that it was worried about attempts to circumvent those Reform Act requirements that apply in federal court alone—namely, the Act's procedural limitations on federal securities class actions. *Id.* § 77z-1(a).

SLUSA's legislative history overwhelmingly supports this conclusion. Committee reports, sponsors, witnesses, and even opponents stated without qualification that SLUSA would "make[] Federal court the exclusive venue for most securities class action

lawsuits." H.R. Conf. Rep. No. 105-803, at 13; *see* Pet. Br. 21-24.[3] Tellingly, respondents do not even try to make a contrary showing. They assert that most class-action suits filed between the Reform Act and SLUSA involved state-law claims. Resp. Br. 28. Yet even they acknowledge this was not the exclusive means of evasion practiced during that period. *Id.* And SLUSA's text, its findings, and its drafters' statements all make clear that Congress aimed to prevent *any* efforts to evade the Reform Act by filing in state court, not just the particular form of evasion most prevalent at the time. *See* 15 U.S.C. § 77v(a); SLUSA § 2(2)-(3); Pet. Br. 21-22.

c. *"[E]nact[ing] national standards."* Finally, respondents' reading would thwart the Act's stated goal of establishing "Uniform Standards" for federal securities class actions. If plaintiffs could file 1933 Act class actions in state court, they would be free of the procedural safeguards Congress imposed for such suits, including the standards governing professional plaintiffs, damages awards, attorney's fees, and many other matters. Pet. Br. 26-27.

Respondents claim (at 29) that it is enough that every covered class action would be governed by "uniform federal *substantive* standards." But SLUSA and its legislative history make plain that Congress was concerned about procedure as well as substance. *See, e.g.*, SLUSA § 101(a)(2) (preventing "[c]ircumvention of [s]tay[s] of [d]iscovery"); Pet. Br.

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[3] The Conference Report says "most" because SLUSA "preserves State jurisdiction" over the "specific types of [state-law] actions" listed in sections 16(d) and 16(f)(2)(B). H.R. Conf. Rep. No. 105-803, at 13-14.

25-29. And experience confirms that where businesses are no longer protected by the Reform Act's procedures—as is currently the case in California—they are once again subject to the sort of extortionate and meritless litigation the Reform Act was designed to prevent. *See* Amicus Br. of N.Y. Stock Exch. 9-12; Amicus Br. of Sec. Indus. & Fin. Mkts. Ass'n *et al.* 6-12; Amicus Br. of Alibaba Grp. *et al.* 16-25; Amicus Br. of Law Professors 19-25.

2. Respondents point to snippets of text from three precedents that they claim have settled for good that Congress's sole purpose in enacting SLUSA was "to stop the use of state law securities claims to evade the [Reform Act]'s restrictions." Resp. Br. 26. That argument is as wrong as it sounds.

Of the cases respondents cite, only one—*Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71 (2006)—contains any extended analysis of SLUSA's purposes, and that analysis largely favors petitioners. The Court explained that SLUSA was prompted by the fact that plaintiffs were "avoid[ing] the federal forum altogether"; that "state-court litigation," though previously "rare," had become common; and that Congress enacted SLUSA "[t]o stem this 'shif[t] from Federal to State courts.'" *Id.* at 82 (quoting SLUSA § 2(2)). The Court did note that plaintiffs had begun "bringing class actions under state law, often in state court." *Id.* But the Court may have made that observation merely because *Dabit* itself concerned "state-law class-action claims" barred by SLUSA's preclusion provision. *Id.* at 74. The Court certainly said nothing to suggest that SLUSA's *only* purpose was to eliminate state-law claims.

Kircher and *Troice* are even less helpful for respondents. Like *Dabit*, these cases only involved the scope of SLUSA's preclusion provision. *Kircher* engaged in no independent analysis of SLUSA's purposes; it just quoted three sentences from *Dabit* when introducing the statute. 547 U.S. at 636. And *Troice*'s discussion of the Act's purposes consists of a single quotation from the statutory findings that it said reflected Congress's desire to avoid "limit[ing] the scope of protection under state laws" for "garden-variety fraud." 134 S. Ct. at 1068. The notion that these cases "carefully studied SLUSA's text, structure, and history," adopted respondents' restrictive interpretation, and foreclosed all future recourse to the Act's findings and history, Resp. Br. 24-27, 29, is pure fiction.[4]

D. Background Principles Do Not Warrant A Different Interpretation

Finally, respondents invoke various "tie-breaker" principles. Resp. Br. 10. As an initial matter, there is no "tie" to break: Respondents' proposed reading would render the statutory text inoperative, subvert the statutory structure, and contravene SLUSA's

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[4] Respondents also wrench several statements out of context to suggest that the Court found that Congress sought to preserve state-court jurisdiction over federal claims. *See* Resp. Br. 25-26. Each of the statements they quote unambiguously refers to state-law clams. *See Dabit*, 547 U.S. at 87 (referring to "certain [state-law] class actions" exempted by 15 U.S.C. § 78bb(f)(3)(A)-(C) and (f)(5)(C)); *Kircher*, 547 U.S. at 644 n.12 (discussing "state-law cases" outside the scope of section 16(b)); *Troice*, 134 S. Ct. at 1066 (explaining that section 16(b) does not affect state-law claims in "uncovered securities").

purposes. And the principles respondents invoke are inapplicable even on their own terms.

Respondents claim (at 10-11) that Congress would have spoken "clearly" if it intended to upset "settled law" or "change the federal-state balance." Prior to the Reform Act, however, "there was essentially no significant securities class action litigation brought in State court." *Dabit*, 547 U.S. at 88 (quoting H.R. Conf. Rep. No. 105-803, at 14). Even if such suits were "theoretically available," they were "virtually unheard of." *Id.* Indeed, respondents have not identified *any* 1933 Act class action filed in state court until the Reform Act was passed, when—as they acknowledge, Resp. Br. 28—such cases suddenly emerged. Just as *Dabit* explained in rejecting a similar argument, "[t]his is hardly a situation * * * in which a federal statute has eliminated a historically entrenched state-law remedy." 547 U.S. at 88.

Furthermore, Congress *did* speak clearly in expressing its intention to divest state courts of jurisdiction. SLUSA announces Congress's aim of stemming the "shift[] from Federal to State courts" of "securities class action lawsuits," SLUSA § 2(2), and expressly "except[s] * * * covered class actions" from state courts' "concurrent" "jurisdiction," 15 U.S.C. § 77v(a). Unlike all of the cases respondents cite—which involved statutes that contained no language addressing state-court jurisdiction, Resp. Br. 11 n.3—here Congress made clear it wished to "except" some cases from the jurisdiction of state courts; the only question is the scope of that directive. And the "explicit" statutory text, the "unmistakable implication from legislative history," and the "clear incompatibility between state-court jurisdiction and federal interests," *Tafflin* v. *Levitt*, 493 U.S. 455, 459-460

(1990), all indicate that Congress wished to "except" 1933 Act claims in "covered class actions." Pet. Br. 38.

II. IF THIS COURT REJECTS PETITIONERS' READING, IT SHOULD ADOPT THE UNITED STATES'

The United States recognizes that the "efficacy" of the Reform Act's "substantive and procedural requirements * * * depends on defendants' access to a federal forum." U.S. Br. 23. But it disagrees on how SLUSA ensures that "access." In the United States' view, section 16(c) authorizes defendants to remove 1933 Act covered class actions involving covered securities to federal court. *Id.*

The United States' reading of section 22(a) is not as faithful to SLUSA's text, structure, and purpose as petitioners'. As noted above, the United States would deprive the "except" clause of meaningful effect. And the United States' construction of that clause rests on several textual and structural arguments that cannot withstand close scrutiny. *See supra* pp. 3-7, 10-11, 14-16.

Nonetheless, the United States' interpretation of the statute is more faithful than respondents'. It would ensure that 1933 Act class actions could be heard in a federal forum, subject to the protections of the Reform Act. U.S. Br. 23. And it would "vindicate[]" Congress's objectives by "preventing circumvention" of the Reform Act, stemming the shift of securities class actions from federal to state court, and ensuring that 1933 Act class actions are gov-

erned by uniform substantive and procedural standards. *Id.*[5]

Accordingly, if the Court agrees with respondents' interpretation of the "except" clause, it should also adopt the United States' reading of section 16(c). The various provisions of SLUSA work together as a coherent scheme. Adopting respondents' reading of the "except" clause and nothing more would open up a gaping hole in that scheme. If the Court opens that hole, it should plug it. Any other course would allow for "state-court circumvention of [Reform Act] requirements," *id.* at 24 n.2, sow confusion in the lower courts, and enable the abuse of the class-action vehicle that the Reform Act and SLUSA were enacted to foreclose.

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[5] Respondents intimate that petitioners did not seek removal because petitioners thought the case was not removable. Resp. Br. 31. That suggestion is baseless. Petitioners did not seek removal because respondents' incorrect reading of the statute was so entrenched in the relevant jurisdiction that litigants had been sanctioned for attempting to remove 1933 Act cases. *See Iron Workers Mid-S. Pension Fund* v. *Terraform Glob., Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374, at *5-6 (N.D. Cal. Mar. 3, 2016); *see also* Pet. 11-13 & nn.8-16 (describing inconsistent removal rules in the lower courts).

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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